

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

STATE OF DELAWARE,	:	
	:	I.D. No. 1003006262
v.	:	
	:	
JAMES J. DURHAM,	:	
	:	
Defendant.	:	

Submitted: May 12, 2011

Decided: June 9, 2011

**ORDER**

Upon Defendant's Motion for a New Trial.

*Denied.*

Stephen R. Welch, Jr., Esquire, Department of Justice, Dover, Delaware; attorney for the State.

Kathleen K. Amalfitano, Esquire, Dover, Delaware; attorney for the Defendant.

WITHAM, R.J.

The issue before the Court is whether to grant a new trial to Defendant because a critical witness has recanted her testimony, which she claims she gave under coercion from her lawyer, when the testimony is consistent with the witness' prior statement to police that was given before the alleged coercion. For the reasons outlined below, this Court will deny the motion.

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**FACTS**

James Durham ("Defendant") was convicted of Robbery in the First Degree and related charges on October 7, 2010. It was alleged that Defendant robbed Paul Message ("the Victim") on March 8, 2010. Message was carrying a large amount of cash at the time because he had won over \$3,000 at the Dover Downs casino that day. The robbery was allegedly facilitated by Defendant's long-time girlfriend, Shelva Smith ("Smith"). Smith met the Victim at the casino and agreed to perform a "pole dance" for him in exchange for money. She had the Victim drive her to her apartment complex so that she could "get her pole."<sup>1</sup> The Victim remained in the car while Smith entered the apartment to retrieve her equipment. Defendant allegedly was apprised of the transaction and laid in wait. He allegedly robbed the victim in the parking lot after Smith left the vehicle.

Smith was taken into custody the day after the robbery. An interrogation was conducted by a detective of the Dover Police Department. The detective read Smith her Miranda rights, and she indicated that she was willing to proceed. Smith initially denied any knowledge of the crime. After a short time, Smith broke down and began

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<sup>1</sup> The "pole" is apparently a movable piece of equipment.

crying. Thereafter, she admitted that Defendant admitted to her that he had committed the robbery.<sup>2</sup> She said that Defendant had committed the crime without her knowledge or involvement. Smith was given immunity in exchange for her testimony.

Seven months later, Smith was a witness at Defendant's trial where she gave testimony consistent with her earlier statement. Smith was available for cross-examination. Smith's testimony was critical to the prosecution because the victim was unable to identify the attacker, who was wearing a hood.

Smith has now recanted her testimony. She asserts that she testified under pressure from her attorney. Smith states that her attorney became angry when she told him that she could not testify against Defendant because he did not commit a crime. She stated that she gave the untruthful testimony anyway because she feared that her lawyer would abandon her case if she refused to testify against Defendant in order to secure more lenient treatment. It is significant that the alleged confrontation between Smith and her attorney occurred on the eve of trial, long after Smith had given a statement implicating Defendant in March. She does not explain why she made the allegations in March before the alleged coercion.

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### **PROCEDURAL HISTORY**

Defendant was convicted of Robbery in the First Degree and related crimes on October 7, 2010. He has filed a motion for a new trial pursuant to Superior Court

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<sup>2</sup> The State's theory is that Smith "set up" the victim by luring him to a vulnerable location where Defendant could commit the robbery. Smith denies any complicity in the crime.

Criminal Rule 33.

***Standard of Review***

The Court may grant a new trial under Superior Court Criminal Rule 33 when a new trial would serve the interests of justice.<sup>3</sup>

**DISCUSSION**

Testimony supporting a verdict is presumed to be correct.<sup>4</sup> A defendant challenging a verdict on the basis of recanted testimony has the burden of proving the falsity of the testimony by clear and convincing evidence.<sup>5</sup> Delaware courts apply the *Larrison* test when examining motions for a new trial based on recanted testimony.<sup>6</sup> The *Larrison* test provides three factors for the Court to consider when determining whether to grant a new trial based on recantation: (1) whether the court is reasonably well satisfied that the testimony was false; (2) whether the jury might have reached a different conclusion in the absence of the testimony; (3) whether the party seeking a new trial was surprised by the false testimony and unable to prepare for it or was unaware of its falsity until after the trial.<sup>7</sup>

It appears that Smith's testimony at trial was reliable. Her testimony was

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<sup>3</sup> Del. Super. Ct. Crim. R. 33.

<sup>4</sup> *State v. Dencker*, 2002 WL 31814547 (Del. Super 2002).

<sup>5</sup> *Id.*

<sup>6</sup> *Blakenship v. State*, 447 A.2d 428, 434 (Del. 2000) (citing *Larrison v. United States*, 24 F.2d 82 (7<sup>th</sup> Cir. 1928)).

<sup>7</sup> *Blakenship*, 447 A.2d at 433.

consistent with her prior statement to police, which was made substantially before she was allegedly coerced to implicate Defendant. As the State emphasizes in its brief upon this motion, Smith has had a long and close relationship with Defendant. That fact may explain her recantation now that Defendant has been imprisoned, but it also tends to support her testimony at trial because she implicated him despite the relationship. Under these facts, the Court finds that Defendant has not shown that Smith's trial testimony was false by clear and convincing evidence.

The second factor for consideration is whether the recanted testimony was critical to the conviction. Here, Smith's testimony was essential to the conviction because the victim was unable to identify Defendant. Smith's testimony was important, but Defendant must also show that it was false in order to prevail on this motion. Smith had incentive to testify honestly since her profession as a licenced nursing assistant could have ended should she be prosecuted and convicted.

The third factor is whether Defendant was surprised by the testimony or was otherwise unable to prepare for it. Here, Defendant could not have been surprised by the testimony because he had access to Smith's statement to police that was made months before trial. The statement was provided to Defendant in April, 2010. There was ample time to prepare for trial. Moreover, Defendant had an opportunity for cross-examination. There is no basis for finding that Defendant was surprised or lacked ample opportunity to prepare for Smith's testimony.

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**CONCLUSION**

Wherefore, Defendant's motion is **DENIED**.

IT IS SO ORDERED.

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Honorable William L. Witham, Jr.

WLW/dmh

oc: Prothonotary

xc: Stephen R. Welch, Jr., Esquire  
Kathleen K. Amalfitano, Esquire